UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. 124-44-4674
Issued to: Domingo LEON, JR.

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2432

Domingo LEON, JR.

This appeal has been taken in accordance with 46 U.SC. 7702 and former 46 CFR 5.30-1 (currently 46 CFR Part 5, Subpart J).

By order dated 18 June 1985, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant's merchant mariner's document upon finding proved a charge of misconduct. The charge was supported by three specifications which alleged that appellant, while serving as A.B. on board the S.S. STONEWALL JACKSON, on or about 1 February 1985 wrongfully failed to perform his duty as lookout by being asleep on watch; on or about 3 February 1985 wrongfully failed to perform his duty as lookout by not timely relieving the watch; and on or about 19 February 1985 had in his possession marijuana.

The hearing was held at Norfolk, Virginia, on 19 March, 2 April, 24 April, 15 May, and 21 May 1985. At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charges and supporting specifications.

The Investigating Officer introduced in evidence five exhibits and the testimony of one witness. In defense, Appellant testified on his own behalf, and introduced in evidence one exhibit and the testimony of one additional witness.

The Administrative Law Judge rendered a written Decision and Order on 18 June 1985. He concluded the charge and specifications of misconduct had been proved and revoked Appellant's document.

The complete Decision and Order was served on 24 June 1985. On 18 June 1985, Appellant filed a notice of appeal and requested a temporary document pending appeal. The Administrative Law Judge denied the temporary document request by order dated 21 June 1985 and Appellant appealed. The Commandant on 6 September 1985 affirmed this decision of the Administrative Law Judge. Appeal Decision No. 2405 (LEON).

Appeal was timely perfected on 20 November 1985.

FINDINGS OF FACT

At all relevant times on 1, 3 and 19 February 1985, Appellant was serving as an Able-Bodied Seaman under the authority of his document aboard the S.S. STONEWALL JACKSON. The STONEWALL JACKSON is an 812 foot long, 28,580 ton, documented U. S. freight vessel engaged in overseas service.

On 1 February 1985, Appellant was serving as lookout on the 2000-2400 watch. At approximately 2113, the Third Mate on the bridge observed Appellant seated on the forecastle with his head down. This observation was confirmed by the helmsman. At 2130, the Third Mate notified the Master as to what he had seen, whereupon the Master proceeded immediately to the forecastle. The Master observed Appellant asleep for a period of approximately five minutes before summoning the Chief Mate to the scene to further corroborate the offense.

On 3 February, the Third Mate notified the Master at approximately 2005 that Appellant had no yet relieved the bow lookout. In an attempt to locate Appellant, the Master an the Chief Mate checked Appellant's room as well as the crew's recreational room. They then proceeded to the room of a female member of the crew and there discovered Appellant partially undressed.

On 19 February 1985, a search of the STONEWALL JACKSON was conducted by the master and the Chief Mate for the purpose of locating unlawful contraband. When they searched Appellant's room, the Master found an inch-long marijuana cigarette in a piece of cellophane paper in the pocket of a pair of shorts hanging on the wall. The Chief Mate found an empty cigarette-papers packet in Appellant's wastebasket. The Master confiscated the cigarette and placed it in his safe. These incidents were recorded in the ship's log on 19 February 1985.

The cigarette remained in the safe until it was turned over to a U. S. Customs Service boarding officer when the vessel arrived in Norfolk on 26 February. The officer field tested the cigarette and the results were positive for marijuana. The results of the field test were entered in the ship's log on 26 February 1986.

The remainder of the marijuana cigarette was destroyed by the Customs Service in accordance with standard procedures.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant argues generally that the

specification alleging possession of marijuana was not proved since the hearing procedures were fundamentally unfair and a violation of due process of law. Appellant asserts the following specific grounds for appeal:

1. The third specification was improperly proved by reliance almost exclusively on inadmissible hearsay evidence;

2. The Coast Guard failed to prove that the substance taken from Appellant's room was the same substance later tested by the Customs Officer; and

3. The "attorney" presenting the Coast Guard's case improperly acted as a witness against Appellant during the course of the hearing.

APPEARANCE: Richard Gabriele, Esq., of Schulman & Altman, 84 William St., suite 1501, New York, N.Y. 10038

OPINION

I

Appellant does not deny the first two misconduct specifications, alleging that he was asleep while standing his lookout watch on 1 February 1985 and that he failed to relieve the watch on 3 February 1985. Appellant argues only that proof of these two specifications alone would not have resulted in the revocation of his document. Appellant primarily challenges the proof of the third specification, which alleges possession of marijuana.

Appellant asserts that the log entries detailing the offense alleged in the third specification were inadmissible hearsay.

Strict adherence to the Federal Rules of Evidence, however, is not required in suspension and revocation proceedings (46 CFR 5.537, formerly 46 CFR 5.20-95 (a)), and hearsay evidence is not, as Appellant urges, inadmissible. Appeal Decision 2183 (FAIRRALL), appeal dismissed on Coast Guard motion sub nom. Commandant v. Fairall, NTSB Order EM-89 (1981).

At the hearing, the Investigating Officer introduced certified copies of the log entries detailing the discovery of the marijuana cigarette on February 19, and the results of the field test conducted on February 26. The log entries were made in substantial compliance with the requirements of 46 U.S.C. 11502. Accordingly, such entries are admissible in evidence. 46 CFR 5.20-107(a). " The evidentiary weight to be given such entries is determined separately in each case; however, they may constitute substantial

evidence to support findings. See Appeal Decision 2117 (AGUILAR) and 2133 (SANDLIN)." Appeal Decision 2289 (ROGERS).

Appellant contends further that he was denied the right to due process since the admission of vessel log entries denied him the opportunity to confront and cross-examine those who made the entries.

As noted above, the vessel log entries are admissible under the applicable regulations. At the time the charge was served, the Investigating Officer advised Appellant that he charge was served, the Investigating Officer advised Appellant that he had the right to have witnesses subpoenaed in his behalf. (Exhibit No.1 (Affidavit of Service)). At the outset of the hearing, the Administrative Law Judge told Appellant he could request the calling of additional witnesses. TR-3. See also 46 CFR 5.20-45. "Appellant may not now complain since he failed to request these witnesses when given the opportunity at the hearing." Appeal Decision 2403 (BERGER). The record does not show, and Appellant does not claim, that he ever requested that the authors and custodians of the vessel logs be called as witnesses. Appellant does not claim, that he ever requested that the authors and custodians of the vessel logs be called as witnesses. Appellant "has cited no authority to support the proposition that the authors and custodians must be produced as witnesses where not requested." Appeal Decision 2403 (BERGER); cf. Commandant v. Mintz, NTSB Order No. EM-110 (1984).

(Reversible error where Appellant's request for subpoenas of two witnesses was denied.)

II

Appellant next argues the Coast Guard failed to prove that the substance taken from Appellant's room was the same substance later tested by the Customs Officer. Appellant again asserts that the vessel log entry was inadmissible hearsay and accordingly that no chain of custody can be proved.

The vessel log entry on 26 February 1985 (Log Page 20L) stated that the marijuana "confiscated from Leon was placed in the masters [sic] safe and remained there until turned over to 1> Customs on 2-26-85." As previously noted, the entry is admissible under 46 CFR 5.20-107(a). Appeal Decisions 2417 (YOUNG) and 2289 (ROGERS). The Customs Officer testified at the hearing that the cigarette was removed from the safe and handed to him whereupon he conducted a field test on the cigarette. From this evidence, the Administrative Law Judge determined that the third specification was proved. I find no reversible error in this determination, and

it will not be disturbed on appeal.

III

Appellant's final argument asserts that the "attorney" presenting the Coast Guard's case improperly acted as a witness against Appellant in three instances during the course of the hearing. Those three instances involved (1) the Investigating Officer's certification of the vessel log entries, (2) the Investigating Officer's affidavit of service concerning the charges and instructions given to Appellant relative to his rights at the hearing, and (3) statements concerning the timing of certain (unidentified) occurrences aboard the S. S. STONEWALL JACKSON and whether the Coast Guard charges were served prior to or subsequent to Appellant's discussion with the Customs boarding officers. Appellant's assertions here are without merit.

The applicable regulations found in 46 CFR Part 5 contemplate that the Investigating Officer in these proceedings will have certain duties and responsibilities. These include certification of extracts from logbooks (46 CFR 5.20-106) and informing Appellant of his rights in the proceedings (46 CFR 5.05-25). The other statements about which Appellant complains consisted of the Investigating Officer's argument on Appellant's motions, and did not constitute evidence.

The actions of the Investigating Officer here were not only permissible, but were entirely proper.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated 18 June 1985 at Norfolk, Virginia, is AFFIRMED.

J. C. IRWIN
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C. this 4th day of September, 1986.